No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, AFFLEURE INVESTMENTS, INC., AND TENNESSEE FINE WINES AND SPIRITS, LLC,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF PETITIONER

SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
1440 G Street, NW
Washington, DC 20005

JOHN LAUGHLIN CARTER
Counsel of Record
CARTER HAYES, LLC
4115 Annandale Road
Suite 205
Annandale, VA 20036
(703) 658-7737
jlaughlinc@gmail.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. State Action Constructs and Structures All Markets 4

II. The Twenty-first Amendment Grants States the Authority to Structure Markets for the Production and Distribution of Alcohol 7

III. The Supreme Court Should Restore the States' Full Constitutional Authority Over the Production and Distribution of Alcohol 10

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) ..... *passim*

Bridenbaugh v. Freeman-Wilson,
227 F.3d 848 (7th Cir. 2000) 12

Craig v. Boren,
429 U.S. 190 (1976) 14

Dickerson v. Bailey,
336 F.3d 388 (5th Cir. 2003) 12

Duckworth v. Arkansas,
314 U.S. 390 (1941) 13

Edwards v. Arthur Andersen LLP,
44 Cal.4th 937 (2008) 6

Eldred v. Ashcroft,
537 U.S. 186 (2003) 5

Goldberg v. Kelly,
397 U.S. 254 (1970) 4

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

Hostetter v. Idlewild Bon Voyage Liquor Corp.,
377 U.S. 324 (1964) 10, 14

Joseph S. Finch & Co. v. McKittrick,
305 U.S. 395 (1939) 9

North Dakota v. United States,
495 U.S. 423 (1990) 13

NV One, LLC v. Potomac Realty Capital, LLC,
84 A.3d 800 (R.I. 2014) 6

Oneok, Inc. v. Learjet, Inc.,
135 S.Ct. 1591 (2015) 7

Osborn ex rel. Osborn v. Kemp,
991 A.2d 1153 (Del. 2010) 5

Shelley v. Kraemer,
334 U.S. 1 (1948) 6

State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936) 3, 9, 12

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 3, 9, 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIII, § 1 5

U.S. Const. amend. XXI ..... *passim*

LEGISLATIVE MATERIALS

76 Cong. Rec. 4143 (1933) 10

OTHER AUTHORITIES

Thomas Babor et al., *Alcohol: No Ordinary Commodity: Research and Public Policy* (2d ed. 2010) 2, 7, 8

Ctr. for Disease Control & Prevention, Fact Sheets - Alcohol Use and Your Health 8

Brannon P. Denning, Smokey and the Bandit *in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 Const. Comment. 297 (2002) 9, 10, 14, 15

Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* (3d ed. 2011) 2, 8

Tim Heffernan, *Last Call*, Wash. Monthly, Nov./Dec. 2012 ..... 3, 15

Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977) 5

Greta R. Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (2012) 4

Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (3d ed. 2001) 4

Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-first Amendment*, 79 Notre Dame L. Rev. 1563 (2004) 10, 11, 14

Jonathan M. Rotter & Joshua S. Stambaugh, *What's Left of the Twenty-first Amendment?*, 6 Cardozo Pub. L. Pol'y & Ethics J. 601 (2008) 12, 13

Sidney J. Spaeth, Note, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Calif. L. Rev. 161 (1991) 8

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public. Government—federal, state, and local—constructs and structures markets. All markets therefore reflect the political and moral concerns of the sovereign of the state, which in this case is the people of the United States expressing their wishes through an amendment to the Constitution. The issue here affects the extent to which democratic decision-making at the state level can structure markets for beer, wine, and spirits.

The Open Markets Institute files this brief to make three points. First, markets are a construct of the state. They are not a force of nature. State action creates and structures markets. Among other market enabling and structuring activities, government creates, defines, and protects property rights and enforces contracts and tort, antitrust, and consumer protection law. State

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

action is necessary for markets to exist and so unavoidably structures markets.

Second, recognizing that state action creates markets and that alcohol poses significant public dangers, the Twenty-first Amendment grants expansive regulatory authority over alcohol to the states, including the authority to prohibit the production and sale of alcohol entirely. *See* U.S. Const. amend. XXI, § 2. Given that alcohol is "no ordinary commodity," Thomas Babor et al., *Alcohol: No Ordinary Commodity: Research and Public Policy* (2d ed. 2010), "our Constitution has placed commerce in alcoholic beverages in a special category." *Granholm v. Heald*, 544 U.S. 460, 494 (2005) (Stevens, J., dissenting).

Under the plain language of the Twenty-first Amendment, states have the authority to structure commerce in alcohol to advance a range of public aims. Even as the supporters of the Twenty-first Amendment recognized that national prohibition had been a spectacular failure, they continued to appreciate that alcohol warranted special treatment under the law. A major lesson of national prohibition was that the United States was *not* "a single community in which a uniform policy of liquor control could be enforced." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 6 (3d ed. 2011). The framers of the amendment sought to ensure that alcohol would still be subject to close public oversight and gave this power to the states who would structure markets for alcohol in accordance with local preferences.

Third, the Supreme Court should follow the plain meaning of the Twenty-first Amendment and restore the states' full regulatory authority, under the

Constitution, over alcohol production and distribution. In decisions over the past 34 years, the Court has held that states cannot subject out-of-state and in-state alcohol products to differential treatment. *Granholm*, 544 U.S. at 493; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). These decisions are inconsistent with the plain language of the Twenty-first Amendment and "involve not a construction of the amendment, but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936). Given the conflict between these precedents and the text of Section 2 of the Twenty-first Amendment, the Court should overrule *Granholm* and *Bacchus* and reestablish the states' full constitutional authority to structure markets in alcohol to advance public ends.

Section 2 "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause" and "exercise full police authority in respect of [these products]." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). Under this authority, states should be free to structure commerce in alcohol to advance a range of public ends, including but not limited to the protection of public health, the promotion of the responsible use of alcohol, and the preservation of decentralized markets with many distributors and producers of alcohol. In the twenty-first century, state structuring of alcohol markets is not anachronistic and instead remains as relevant as ever. *See* Tim Heffernan, *Last Call*, Wash. Monthly, Nov./Dec. 2012, https://washingtonmonthly.com/magazine/novdec-2012/last-call/ (examining the different legal approaches to alcohol distribution in the United States and United Kingdom and describing the

comparatively better economic, political, and social outcomes of the American approach).

ARGUMENT

I. State Action Constructs and Structures All Markets

Markets are a construct of the state. They do not arise from spontaneous ordering or natural forces. State action creates and structures markets. Government creates, defines, and protects property rights and enforces contracts, antitrust, consumer protection, and many other laws and regulations that enable markets. State action is necessary for markets to exist and so unavoidably structures markets. Although sometimes referred to as "free" in nature, all markets rest on a bed of state action. Greta R. Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* 145 (2012). Karl Polanyi expressed this point succinctly, writing "laissez-faire was planned." Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time 147 (3d ed. 2001).

Consider one example of market-enabling state action: property rights. The state creates, defines the scope of, and protects property rights. What constitutes property is a legal, and fundamentally political, question. *See Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."). State actors determine what is, and is not, property.

State action has both narrowed and broadened the scope of property rights over time. *See, e.g.* U.S. Const. amend. XIII, § 1 (abolishing slavery and thereby property rights in human beings); *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (upholding Congress's extension of durational terms for both existing and new copyrights in the Copyright Term Extension Act). For instance, to promote economic development, state courts in the nineteenth century curtailed the property rights of some and expanded the property rights of others. They revised and narrowed the common law doctrines of nuisance and trespass, granting factories, railroads, and other commercial entities the right to engage in activities that inflicted harms on nearby landowners without incurring legal liability. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* 70-71 (1977).

Importantly, government also interprets and enforces contracts. Because contracts are often drafted in open-ended terms and cannot account for all contingencies, courts often have to interpret contracts. *See, e.g.*, *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("If a contract is ambiguous, we will apply the doctrine of *contra proferentem* against the drafting party and interpret the contract in favor of the non-drafting party.").

Enforcement of contracts includes conscious legal choices to withhold state action from parties to certain contracts and *not* enforce agreements that violate constitutional requirements and other public policy. For instance, the Supreme Court has held that the enforcement of racially restrictive covenants violates the equal protection clause of the Fourteenth

Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948). In holding these restrictive covenants to be unenforceable, the Court recognized that "these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." *Id.* at 19.

The states have also opted *not* to enforce certain contracts. By way of example, legislatures in some states have enacted laws that deny judicial enforcement of employee non-compete clauses and credit contracts with interest rates exceeding the state usury limit. *See e.g.*, *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 950 (2008) (rejecting "narrow-restraint" exception to statutory prohibition on enforcement of employee non-compete clauses); *NV One, LLC v. Potomac Realty Capital, LLC*, 84 A.3d 800, 805 (R.I. 2014) ("Liability for usurious interest rates in Rhode Island is well settled and clear. The maximum allowable interest rate is a statutory construct whereby interest rates in excess of 21 percent per annum are deemed usurious. Section 6–26–2(a). Contracts in violation of § 6–26–2 are usurious and void, and the borrower is entitled to recover any amount paid on the loan.").

These examples of property and contract are not exhaustive and merely illustrate how state action enables market activity. As these cases show, state structuring of markets is unavoidable. Through property, contract, and other forms of law and regulation, governments (federal, state, and local)

decide what can—and cannot—be bought and sold in markets and shape the distribution of power among market participants.

II. The Twenty-first Amendment Grants States the Authority to Structure Markets for the Production and Distribution of Alcohol

In the United States today, entities that wield power to structure markets and market activities include Congress, state legislatures, administrative agencies at both the federal and state levels, federal and state courts, and the public directly, such as through referenda. Some bodies, such as Congress and state legislatures, are more democratic and publicly accountable than others, such as courts and agencies. In a modern economy, all these governmental entities exercise market-structuring authority and indeed often overlapping authority. *See, e.g.*, *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1602-03 (2015) (holding that the Natural Gas Act administered by the Federal Energy Regulatory Commission does not field-preempt respondents' state antitrust claims against natural gas traders). In the markets for producing and selling alcohol, the Twenty-first Amendment grants expansive authority to the states and permits states to go as far as imposing complete prohibition on the manufacture and sale of alcohol within their borders.

In addition to ending national prohibition, the Twenty-first Amendment granted broad regulatory authority over alcohol to the states. U.S. Const. amend. XXI, §§ 1, 2. While the supporters of the amendment recognized that national prohibition had been a spectacular failure, they recognized that alcohol was "no ordinary commodity." Thomas Babor et al., *Alcohol:*

No Ordinary Commodity: Research and Public Policy (2010). It is a "drug with toxic effects and other intrinsic dangers such as intoxication and dependence." *Id.* at 11. *See also* Ctr. for Disease Control & Prevention, *Fact Sheets – Alcohol Use and Your Health*, https://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm ("Excessive alcohol use led to approximately 88,000 deaths and 2.5 million years of potential life lost (YPLL) each year in the United States from 2006 – 2010, shortening the lives of those who died by an average of 30 years.").

A major lesson from national prohibition was that the United States was *not* "a single community in which a uniform policy of liquor control could be enforced." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 6 (3d ed. 2011). National prohibition's defiance of local attitudes toward alcohol in many parts of the country had been a key contributor to the lawlessness that resulted from the experiment. Sidney J. Spaeth, Note, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Calif. L. Rev. 161, 165 (1991). Given this experience, the framers of the amendment sought to ensure that alcohol would still be subject to close public oversight and gave this power to the states to structure markets for alcohol in accordance with local preferences.

The plain language of the Twenty-first Amendment grants broad market structuring authority over alcohol to the state. Section 2 states that "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is

hereby prohibited." U.S. Const. amend. XXI, § 2. Under this authority, states can establish prohibition on alcohol within their borders. Since the greater power to prohibit includes the lesser power to regulate, the text of Section 2 grants states the right to regulate the manufacture and sale of alcohol when they choose to permit it. *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 63 (1936) (Brandeis, J.).

In the wake of the enactment of the Twenty-first Amendment, this broad interpretation of Section 2 was uncontroversial. Speaking for the Court more than eighty years ago, Justice Brandeis wrote that requiring states to permit out-of-state liquors to "compete with the domestic on equal terms . . . . would involve not a construction of the [Twenty-first Amendment], but a rewriting of it." *Id.* at 62. The Court held that under the Twenty-first Amendment states could enact rules on the distribution of alcohol that would otherwise violate the dormant Commerce Clause. *Id. See also Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (Brandeis, J.) ("Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) ("The Twnenty-first [sic] Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.").[2] And states "ratified the Twenty-

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[2] Justice Black who participated in the debates over the Twenty-first Amendment as a member of the Senate stated that the legislative history supported the plain language of Section 2. Brannon P. Denning, Smokey and the Bandit *in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and*

first Amendment with the understanding that it constituted a sweeping grant of states' rights, not a narrowly tailored protection for dry states." Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-first Amendment*, 79 Notre Dame L. Rev. 1563, 1580 (2004).

III. The Supreme Court Should Restore the States' Full Constitutional Authority Over the Production and Distribution of Alcohol

The Supreme Court should follow the plain meaning of the Twenty-first Amendment and restore the states' constitutional authority over alcohol production and distribution. Notwithstanding the text of the Twenty-first Amendment, the Court has restricted this grant of authority and qualified Section 2 on dormant Commerce Clause grounds. Given the tension between its precedents and the text of Section 2, the Court should reestablish the states' expansive constitutional

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State Regulation of Internet Alcohol Sales, 19 Const. Comment. 297, 307 (2002). In dissent, he wrote that "[t]he legislative history, . . ., should be enough to prove that when the Senators agreed to Section 2 they thought they were returning 'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 338 (1964) (Black, J., dissenting). To illustrate Justice Black's point, the floor manager of the amendment in the Senate stated that "Section 2 'restore[d] to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States.'" 76 Cong. Rec. 4143 (1933) (statement of Sen. Blaine).

authority to structure markets in alcohol for public ends.

In holding that states cannot subject out-of-state and in-state alcohol products to differential treatment, *Granholm v. Heald*, 544 U.S. 460, 493 (2005); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), the Court has contradicted the plain language of the Twenty-first Amendment.[3] Justice Thomas noted this conflict in his meticulous dissent in *Granholm*. Comparing the text of the Twenty-first Amendment to that of the earlier enacted Webb-Kenyon Act, Justice Thomas wrote that the Twenty-first Amendment's "broader language even more naturally encompasses discriminatory state laws . . . . suggest[ing], for example, that a State may ban imports entirely while leaving in-state liquor unregulated[.]" *Granholm*, 544 U.S. at 514 (Thomas, J., dissenting). In critiquing the majority's "totally novel approach to the Twenty-first Amendment" in *Bacchus*, 468 U.S. at 286-87 (Stevens, J., dissenting), Justice Stevens articulated this same understanding of the Twenty-first Amendment. *See id.* at 286 ("If the State has the constitutional power to create a total local monopoly—thereby imposing the most severe form of discrimination on competing product originating elsewhere—I believe it may also engage in a less extreme form of discrimination that merely provides a special benefit, . . . , for locally produced alcoholic beverages.").

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[3] Indeed, *Bacchus* and *Granholm* recall the Court's readiness to strike down state alcohol rules in the pre-prohibition era. Prince, *supra*, at 1587.

Bacchus and *Granholm* "involve not a construction of the [Twenty-first Amendment], but a rewriting of it." *Young's Market*, 299 U.S. at 62. The Court has greatly narrowed the amendment's broad grant of regulatory authority to the states on the regulation of alcohol production and distribution, a grant of authority that includes the right to prohibit the production and sale of alcohol entirely. U.S. Const. amend. XXI, § 2. The Court's narrow reading of state authority over alcohol is especially ironic because, as Judge Easterbrook wrote, it "pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

In grafting the dormant Commerce Clause on to the Twenty-first Amendment, the Court has granted judges improper supervisory authority over the state structuring of alcohol markets. *Bacchus* held that differential treatment of in-state and out-of-state alcohol producers survive constitutional scrutiny only when they advance the "clear concerns" of the Twenty-first Amendment.468 U.S. at 276. Citing *Bacchus*, other courts have described this as "the 'core concerns' test." *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003). In defending their laws and regulations against dormant Commerce Clause challenges, states face an uncertain—and indeed shrinking—definition of "core concerns" under the Twenty-first Amendment. Jonathan M. Rotter & Joshua S. Stambaugh, *What's Left of the Twenty-first Amendment?*, 6 Cardozo Pub. L. Pol'y & Ethics J. 601, 649 (2008). One thing is certain though: "mere economic protectionism" is not a core concern. *Bacchus*, 468 U.S. at 276.

Given the fluidity of the core concern or a functionally similar requirement,[4] democratic efforts at the state level to govern alcohol markets may run afoul of a constitutionality test formulated by judges. The extent to which courts may override state choices under the Twenty-first Amendment is not clear. For instance, while the Court described the three-tier system as "unquestionably legitimate," *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)), courts could in the future decide that the three-tier system functions as "mere economic protectionism[,]" *Bacchus*, 468 U.S. at 276, for in-state distributors or producers of alcohol. Rotter & Stambaugh, *supra*, at 649. As Justice Jackson wrote, the people of the United States enacted the Twenty-first Amendment to *foreclose* this type of judicial legislating over the production and sale of alcohol. *See Duckworth v. Arkansas*, 314 U.S. 390, 398-99 (1941) (Jackson, J., concurring) ("The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate

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[4] In *Granholm*, as Justice Thomas noted in dissent, the Court did not use the term "core concerns" and instead applied a conventional dormant commerce clause analysis. 544 U.S. at 524 (Thomas, J., dissenting). That said, "[i]n *Granholm*, the Court appears to have assumed, quite reasonably, that preventing access to alcohol by minors was an acceptable Twenty-first Amendment purpose[.]"). Rotter & Stambaugh, *supra*, at 614.

commerce to curb liquor's 'tendency to get out of legal bounds.'").[5]

The Court should overrule *Bacchus* and *Granholm* and restore the states' full constitutional authority to construct and structure markets for alcohol.[6] In these decisions, the Court has "essentially declared itself better suited to determine the nation's alcohol policy than the states and Congress." Prince, *supra*, at 1610-11. Under the text of the Twenty-first Amendment, states have the authority to prohibit the production, sale, and use of alcohol entirely. When they do permit the production and sale of alcohol, states should have the freedom to structure alcohol markets, without fear

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[5] "To date, the Twenty-first Amendment is the only amendment to be ratified by specially-convened state conventions." Denning, *supra*, at 308 n.50.

[6] Restoring the states' constitutional authority over alcohol would not immunize their choices in this realm from federal statutes and the Constitution in general. As Justice Thomas observed in his dissent in *Granholm*, Section 2 of the Twenty-first Amendment limits only the application of the *dormant* Commerce Clause to state structuring of alcohol markets. Congress can still regulate alcohol through statutes enacted under its Commerce Clause powers. 544 U.S. at 525 (Thomas, J., dissenting). *See, e.g.*, *Hostetter*, 377 U.S. at 334 (blocking state action against seller of alcohol to international travelers because it interfered with the operation of a law passed by Congress pursuant to its Commerce Clause power). Furthermore, aside from being exempt from the dormant Commerce Clause, state laws and regulations on alcohol would still have to comply with other constitutional requirements. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 192, 210 (1976) (holding that Oklahoma statute that "prohibits the sale of 'nonintoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18" violates the equal protection clause of the Fourteenth Amendment).

of courts' overriding their choices using the dormant Commerce Clause. Nothing in the Twenty-first Amendment restricts state authority to judicially-defined "core concerns" of the amendment. Denning, *supra*, at 299.

Section 2 "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause" and "exercise full police authority in respect of [these products]." *Ziffrin*, 308 U.S. at 138. Therefore, states should have the authority to structure commerce in alcohol to promote a range of public ends, including but not limited to the protection of public health, the promotion of the responsible use of alcohol, and the maintenance of decentralized markets with many distributors and producers of alcohol. In the twenty-first century, state structuring of alcohol markets is not anachronistic and instead remains as relevant as ever. *See* Tim Heffernan, *Last Call*, Wash. Monthly, Nov./Dec. 2012, https://washingtonmonthly.com/magazine/novdec-2012/last-call (examining the different legal approaches to alcohol distribution in the United States and United Kingdom and describing the comparatively better economic, political, and social outcomes of the American approach).

CONCLUSION

The Court should overrule its decisions in *Bacchus* and *Granholm* and restore the states' full constitutional authority to regulate the production and distribution of alcohol.

Respectfully submitted,

John Laughlin Carter
Counsel of Record
Carter Hayes, LLC
4115 Annandale Road
Suite 205
Annandale, VA 20036
(703) 658-7737
jlaughlinc@gmail.com

Sandeep Vaheesan
Open Markets Institute
1440 G Street, NW
Washington, DC 20005

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Counsel for Amicus Curiae